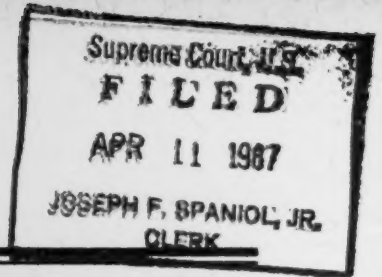


(2)
No. 87-1342



In the Supreme Court of the United States

OCTOBER TERM, 1987

RODOLFO T. ARAMBULO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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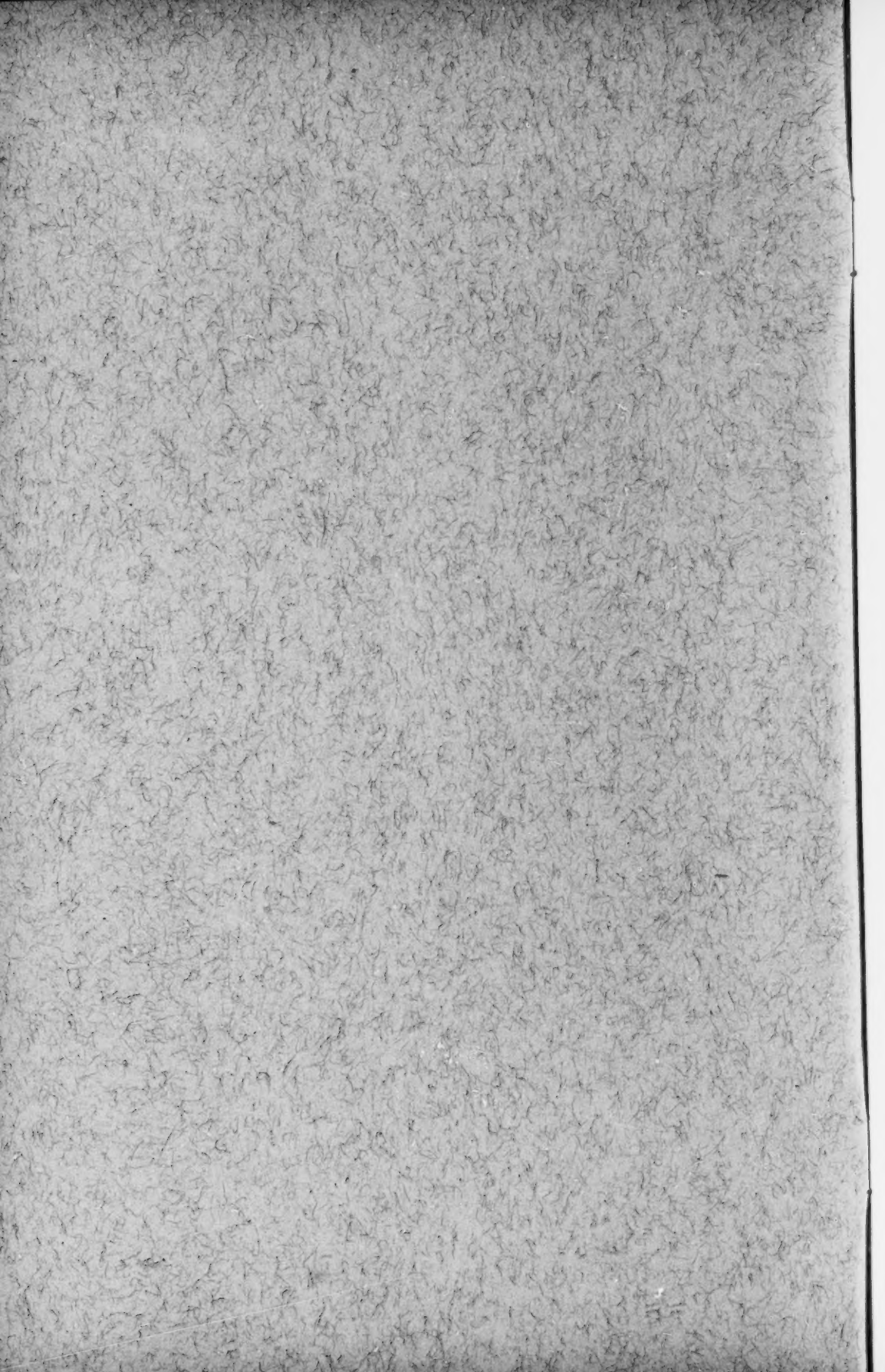
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QUESTIONS PRESENTED

1. Whether a fugitive witness charged with civil contempt for failing to appear before a grand jury is entitled to have his contempt hearing open to the public.

2. Whether the district court abused its discretion when it imposed a substantial monetary sanction to compel petitioner to comply with a court order to appear before a grand jury.



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OPINION BELOW

The opinion of the court of appeals (Pet. App. C1-C13) is reported at 835 F.2d 437.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1987. The petition for a writ of certiorari was filed on February 9, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A federal grand jury in the Southern District of New York is investigating allegations that various individuals associated with Ferdinand E. Marcos, former President of the Republic of the Philippines, engaged in various illegal activities, including embezzling funds sent by the United States to the government of the Philippines

and using those funds to purchase commercial real estate in New York City. In particular, the grand jury is investigating the transfer of funds through the California Overseas Bank, a commercial bank in Los Angeles. Petitioner is a high-level officer of the bank and a member of its board of directors. Although petitioner is a citizen of the Philippines, until recently he was present in the United States as a nonresident alien. Pet. App. C2.

On March 25, 1987, the grand jury issued a subpoena to petitioner, who was then living in Los Angeles. The subpoena required petitioner to appear in New York and produce certain documents on April 14, 1987. At the request of petitioner's counsel, the return date on the subpoena was extended to permit counsel to study the matter and to consult with his client. On May 5, 1987, the prosecutor discussed with petitioner's attorney the issues on which the government believed petitioner could provide useful testimony, and the possibility that petitioner would become a government witness after pleading guilty to certain charges. Defense counsel agreed to discuss those matters with his client. Pet. App. C2-C3.

On June 22, 1987, the prosecutor informed petitioner's attorney that the government would seek an immunity order for petitioner. Petitioner's attorney responded that for the government to do so would place his client in a very difficult position because of the individuals against whom he would be forced to testify. Counsel requested a meeting to discuss alternatives to the appearance before the grand jury. After further discussions, the prosecutor advised counsel that petitioner should appear before the grand jury on September 3, 1987. When petitioner failed to appear on that date, the prosecutor obtained an order from the district court directing petitioner to appear on September 8, 1987. When petitioner failed to appear on

that date as well, the district court signed an order directing petitioner to show cause why he should not be held in contempt of court for failing to comply with the court's order. Pet. App. C3-C4.

2. The district court held a hearing on the show cause order. Petitioner, who was (and apparently still is) outside the United States, was not present at the hearing. The prosecutor requested that petitioner be held in contempt for failing to appear before the grand jury. The prosecutor also requested that the proceedings be closed because the contempt hearing was ancillary to the grand jury investigation. The court overruled petitioner's objection to closing the proceedings, and after hearing the arguments of counsel, the court found that petitioner had willfully failed to appear in violation of the order requiring him to do so. Accordingly, the court held petitioner in civil contempt under 28 U.S.C. 1826(a). Pet. App. C4-C5.

The district court initially imposed a \$50,000 fine for the "past transgression" and an additional \$5,000 for each day of continued absence. Petitioner and his representatives were also enjoined from disposing of any of his assets within the United States. On September 29, 1987, the court of appeals stayed enforcement of the monetary sanctions in the order, and the parties stipulated to a partial remand of the order. On October 1, 1987, the trial court entered an amended order under which coercive sanctions of \$50,000 were imposed if petitioner failed to appear on or before October 6, 1987; the order provided that an additional \$5,000 would be levied for each day thereafter that petitioner failed to appear. Pet. App. C5.

3. The court of appeals upheld the contempt sanction. First, the court held that the district court's decision to close the hearing did not deprive petitioner of due process. The court found that "sensitive and secret grand jury in-

vestigative information would be revealed to the prejudice of the public interest" at a public hearing (Pet. App. C8). The court then ruled that the procedural protections afforded a civil contemnor facing only a monetary sanction are not necessarily the same as those accorded to a criminal defendant or even a civil contemnor who is facing imprisonment. Under the circumstances of this case, the court concluded, the district court did not err by ordering that the contempt hearing be closed. Pet. App. C7-C9.

The court also rejected petitioner's objections to the monetary sanction that the district court imposed. The imposition of coercive monetary sanctions, the court noted, "is generally an area in which appellate courts must rely heavily on the informed exercise of the district court's discretion" (Pet. App. C13). The court pointed out that petitioner's counsel could have presented evidence to support his claim that the monetary sanctions were unreasonable, and that in light of his failure to offer evidence on that issue, the district court cannot be held to have abused its discretion (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 5-11) that he was entitled to a public hearing before coercive sanctions could be imposed for his failure to appear before the grand jury. He has identified no conflict among the circuits on that issue and no conflict between the decision of the court of appeals in this case and any decision of this Court. Further review of that issue is therefore unwarranted.

The only decision of this Court that bears on the issue supports the judgment of the court of appeals. In that case, *Levine v. United States*, 362 U.S. 610 (1960), this Court held that a criminal contempt conviction for refusing to answer questions relevant to a grand jury inquiry

did not violate due process even though the proceedings were conducted in secret. The Court ruled that the defendant had no right to have the public present during the contempt hearing when secret grand jury matters were being revealed. The Court also concluded that while the defendant could have insisted that the courtroom be opened at the time of his definitive refusal to comply with the court's direction and the adjudication and sentence, there was no error because his counsel was present throughout and did not specifically request that the proceedings be opened for that limited purpose.

The decision in this case follows *a fortiori* from *Levine*. As the court of appeals concluded, there was a significant likelihood that an open hearing would reveal secret grand jury information. Moreover, like the defendant in *Levine*, petitioner did not request that the proceedings be opened for the limited purpose of allowing him to record his refusal to appear in open court and to permit the adjudication of contempt and the imposition of sanctions to be made in public. In light of the presence of an attorney for the California Overseas Bank at the commencement of the contempt proceeding, it is clear that the prosecutor was not trying to hide petitioner's identity and contumacious behavior from the public and that the prosecutor's only concern was to protect the secrecy of the grand jury's inquiry. In any event, petitioner is hardly in any position to complain about the closed proceeding, because he chose not to appear and even failed to give an explanation through counsel for his failure to appear.

There is likewise no court of appeals support for petitioner's contention. In a prior case, *In re Rosahn*, 671 F.2d 690 (2d Cir. 1982), the same court of appeals held that before a witness is imprisoned for contempt, he has the right to an open public hearing to the extent that such a

hearing is compatible with the secrecy of the grand jury proceedings. See also *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983). The court of appeals held that principle to be inapplicable in this case, because petitioner was faced not with the prospect of imprisonment, but only with a monetary sanction.

Because the civil contempt proceedings in this case were not criminal in nature, petitioner was not entitled to the "public trial" guaranteed by the Sixth Amendment. And because petitioner was not faced with the prospect of incarceration, the interests at stake in this case were more akin to those at issue in civil proceedings than those at issue in criminal prosecutions. Accordingly, the analogy to a criminal prosecution that has been invoked to justify the imposition of a requirement that contempt proceedings be public when liberty is at stake is inapplicable here.¹

Petitioner makes the further argument (Pet. 8-9) that the sanctions for civil contempt are interchangeable and that the district court could substitute imprisonment for the monetary sanctions at any time without a further hearing. That claim, however, is entirely speculative. The district court has not entered any such order altering the sanctions, and if the court at some point does so, petitioner can object at that time that an open hearing is necessary before he can be imprisoned.

¹Nothing in *United States v. Sells Engineering, Inc.* 463 U.S. 418 (1983); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); or *Waller v. Georgia*, 467 U.S. 39 (1984), upon which petitioner also relies, requires that grand jury proceedings be revealed to the public in the course of a contempt proceeding. And the court of appeals cases holding that witnesses are not bound by the obligation of secrecy imposed by Fed. R. Crim. P. 6(e)(2) (see Pet. 9) do not even remotely support petitioner's claim that he is entitled to a public contempt proceeding.

Finally, petitioner is wrong in arguing (Pet. 10-11) that he has been denied his rights under the equal protection component of the Due Process Clause of the Fifth Amendment. Petitioner claims that to draw a distinction between contempt cases resulting in imprisonment and contempt cases resulting in monetary sanctions is impermissible. In other circumstances, however, this Court has upheld precisely that distinction without finding that it creates any equal protection problem. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Muniz v. Hoffman*, 422 U.S. 454, 475-477 (1975).²

2. Petitioner also contends (Pet. 11-13) that even though he is a fugitive and has not advanced any legitimate excuse for his failure to appear, the district court should not have imposed a substantial fine without concrete evidence of his ability to pay. This contention does not merit review.

A sanction imposed for civil contempt ordinarily serves to coerce the contemnor into complying with the court's order. *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947). The amount of a coercive fine rests in the trial court's discretion, a discretion that has been said to be virtually unreviewable. *In re Dickinson*, 763 F.2d 84, 89 (2d Cir. 1985) (\$1,500 daily fine on contemnor upheld). The factors to be considered in the exercise of that discretion include the "character and magnitude of the harm threatened by continued contumacy, and the probable ef-

² *Mayer v. City of Chicago*, 404 U.S. 189 (1971), on which petitioner relies, is not applicable at all. That case involved the denial of transcripts to indigent defendants, which the Court held to lead to an impermissible distinction among defendants based on wealth. The court of appeals' decision in this case creates no such invidious discrimination among potential contemnors based on wealth or any other classification.

fect of any suggested sanction in bringing about the result desired" (*United States v. United Mine Workers*, 330 U.S. at 304 (footnote omitted)).

In the present case, the record shows that the grand jury was investigating a particularly large and notorious fraud—the alleged embezzlement of substantial amounts of American foreign aid to the Philippines as well as funds of the Philippine government in order to purchase commercial real estate in New York City. The record further showed that petitioner was a high-level officer and a director of the bank that handled many of the transactions under investigation. As the court of appeals observed, the information before the district court revealed that without petitioner's testimony the investigation could be jeopardized. Pet. App. C12. In addition, in light of petitioner's high office within the bank, the district court could properly conclude that a smaller monetary sanction would not have had any coercive effect on petitioner at all. The district court's selection of a sanction was particularly appropriate in light of the fact that, as the court of appeals noted (Pet. App. C12-C13), petitioner's attorney did not suggest to the district court that the fine was unduly burdensome, nor did he present any evidence to that effect, either at the initial hearing or after the remand to the trial court ~~for modification~~ of the initial sanction order. Under those circumstances, the court of appeals was correct in holding that the district court did not abuse its discretion in its choice of the amount of the sanction.

Finally, petitioner asserts (Pet. 13) that it was improper for the court of appeals to take into account his counsel's failure to present any evidence suggesting that the monetary sanction was unduly burdensome. While petitioner now claims that imposing any burden on him to produce evidence violates the Sixth Amendment, the

attorney-client privilege, and the Fifth Amendment privilege against compulsory self-incrimination, petitioner does not explain how presenting evidence regarding his assets would have run afoul of any of those rights. Nor did petitioner suggest to the district court that his failure to make any showing regarding the effect of the sanctions was based on the invocation of any of those rights. To the contrary, it was apparent from counsel's remarks that his failure to address the impact of the sanctions was not based on any invocation of petitioner's rights, but on counsel's lack of familiarity with petitioner's affairs. See Pet. App. A31-A32. And counsel's lack of preparation on that point is attributable, in part or in whole, to petitioner's decision to be absent from the hearing, a choice that he should not be allowed to convert to his advantage.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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APRIL 1988